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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 JOANN WHITE, ) NO. ED CV 08-780-E  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 MICHAEL J. ASTRUE, COMMISSIONER ) AND ORDER OF REMAND  
18 OF SOCIAL SECURITY ADMINISTRATION, )  
19 )  
20 Defendant. )  
21 )  
22 )  
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25 )  
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18  
19 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
20 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
21 judgment are denied and this matter is remanded for further  
22 administrative action consistent with this Opinion.  
23

24 PROCEEDINGS  
25

26 Plaintiff filed a complaint on June 18, 2008, seeking review  
27 of the Commissioner's denial of benefits. The parties filed a consent  
28 to proceed before a United States Magistrate Judge on October 14,

1 2008. Plaintiff filed a motion for summary judgment on December 3,  
2 2008. Defendant filed a cross-motion for summary judgment on  
3 December 19, 2008. The Court has taken both motions under submission  
4 without oral argument. See L.R. 7-15; "Order," filed June 20, 2008.  
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#### 6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

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8 Plaintiff asserts disability beginning April 1, 2006, based  
9 primarily on alleged mental impairments (Administrative Record  
10 ("A.R.") 26-30, 68-71). Dr. Villar, a treating psychiatrist, opined  
11 Plaintiff is "seriously limited" with respect to certain mental  
12 abilities and aptitudes needed to perform work (A.R. 190-91).  
13 Dr. Villar specifically opined that Plaintiff's impairments or  
14 treatment would cause her to be absent from work more than four days  
15 per month (A.R. 191). Dr. Enge, another treating psychiatrist, rated  
16 Plaintiff's Global Assessment of Functioning ("GAF") at 47 (A.R. 155).  
17

18 An Administrative Law Judge ("ALJ") found Plaintiff not  
19 disabled (A.R. 10-16). The ALJ rejected Dr. Villar's opinions  
20 asserting, inter alia, that "treating notes" do not support the  
21 opinions (A.R. 14-15). The ALJ failed to mention Dr. Enge's GAF  
22 assessment (A.R. 10-16). The Appeals Council denied review (A.R. 2-  
23 4).  
24

#### 25 **STANDARD OF REVIEW**

26

27 Under 42 U.S.C. section 405(g), this Court reviews the  
28 Commissioner's decision to determine if: (1) the Commissioner's

1 findings are supported by substantial evidence; and (2) the  
2 Commissioner used proper legal standards. See Swanson v. Secretary,  
3 763 F.2d 1061, 1064 (9th Cir. 1985).

#### 4 5 DISCUSSION

6  
7 A treating physician's conclusions "must be given substantial  
8 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see  
9 Rodriquez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must  
10 give sufficient weight to the subjective aspects of a doctor's opinion  
11 . . . This is especially true when the opinion is that of a treating  
12 physician") (citation omitted). Even where the treating physician's  
13 opinions are contradicted,<sup>1</sup> "if the ALJ wishes to disregard the  
14 opinion[s] of the treating physician he . . . must make findings  
15 setting forth specific, legitimate reasons for doing so that are based  
16 on substantial evidence in the record." Winans v. Bowen, 853 F.2d  
17 643, 647 (9th Cir. 1987) (citation, quotations and brackets omitted);  
18 see Rodriquez v. Bowen, 876 F.2d at 762 ("The ALJ may disregard the  
19 treating physician's opinion, but only by setting forth specific,  
20 legitimate reasons for doing so, and this decision must itself be  
21 based on substantial evidence") (citation and quotations omitted);  
22 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989) ("broad and  
23 vague" reasons for rejecting the treating physician's opinions do not  
24 suffice).

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27 <sup>1</sup> Rejection of an uncontradicted opinion of a treating  
28 physician requires a statement of "clear and convincing" reasons.  
Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996); Gallant v.  
Heckler, 753 F.2d 1450, 1454 (9th Cir. 1984).

1           Section 404.1512(e) of 20 C.F.R. provides that the  
2 Administration "will seek additional evidence or clarification from  
3 your medical source when the report from your medical source contains  
4 a conflict or ambiguity that must be resolved, the report does not  
5 contain all of the necessary information, or does not appear to be  
6 based on medically acceptable clinical and laboratory diagnostic  
7 techniques." See Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996)  
8 ("If the ALJ thought he needed to know the basis of Dr. Hoeflich's  
9 opinions in order to evaluate them, he had a duty to conduct an  
10 appropriate inquiry, for example, by subpoenaing the physicians or  
11 submitting further questions to them. He could also have continued  
12 the hearing to augment the record") (citations omitted); see also  
13 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983) ("the ALJ has a  
14 special duty to fully and fairly develop the record and to assure that  
15 the claimant's interests are considered").

16  
17           In the present case, the ALJ erred in connection with the  
18 opinions of the treating physicians. Further inquiry of Dr. Villar  
19 should have preceded a final determination of whether Dr. Villar's  
20 opinions are not adequately supported. See Smolen v. Chater, 80 F.3d  
21 1273, 1288 (9th Cir. 1996); 20 C.F.R. § 404.1512(e). The ALJ also  
22 should not have rejected Dr. Enge's opinion without inquiring further  
23 of Dr. Enge and without discussing the opinion. See Salvador v.  
24 Sullivan, 917 F.2d 13, 15 (9th Cir. 1990) (implicit rejection of  
25 treating physician's opinion cannot satisfy Administration's  
26 obligation to set forth "specific, legitimate reasons").

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1 To the extent Defendant now offers reasons for disregarding  
2 Dr. Enge's opinion (or reasons for disregarding Dr. Villar's opinions  
3 not stated in the ALJ's decision), the Court must decline to entertain  
4 the offer. The Court "cannot affirm the decision of an agency on a  
5 ground that the agency did not invoke in making its decision." Pinto  
6 v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001).

7  
8 The above-described errors were not necessarily harmless. The  
9 ALJ and Defendant assert that, even accepting the limitations  
10 suggested in Dr. Villar's opinions, Plaintiff still could perform  
11 work. Such assertion is extremely dubious. For example, Dr. Villar  
12 opined that Plaintiff's impairments or treatment would cause her to be  
13 absent from work more than four days per month. Such frequent  
14 absences likely would preclude substantial gainful employment. See,  
15 e.g., Carter v. Astrue, 2008 WL 4498960 \*4 (M.D. Ga. Sept. 30, 2008)  
16 (ALJ determined that a claimant's absences for more than four days per  
17 month required a finding of disability); Gresham v. Astrue, 2007 WL  
18 3208554 \*7 (S.D. Iowa Sept. 28, 2007) (vocational expert testified  
19 employers would not tolerate an employee who was absent more than four  
20 days per month).

21  
22 Defendant also argues the alleged harmlessness of the ALJ's  
23 failure to mention Dr. Enge's GAF assessment. Again, the Court is  
24 unable to deem the error harmless. "A GAF of 41-50 means that the  
25 plaintiff exhibits '[s]erious symptoms (e.g., suicidal ideation,  
26 severe obsessional rituals, frequent shoplifting) or any serious  
27 impairment in social, occupational, or school functioning (e.g. no  
28 friends, unable to keep a job).'" Tagger v. Astrue, 536 F. Supp. 2d

1 1170, 1173 n.4 (C.D. Cal. 2008) (citing American Psychiatric  
2 Association, Diagnostic and Statistical Manual of Mental Disorders, 34  
3 (4th Ed. 2000); see also Castaneda v. Apfel, 2001 WL 210175 \*3 (D. Or.  
4 Jan. 18, 2001) (a GAF of 45 "is indicative of a disabling level of  
5 impairment").

6  
7 When a court reverses an administrative determination, "the  
8 proper course, except in rare circumstances, is to remand to the  
9 agency for additional investigation or explanation." INS v. Ventura,  
10 537 U.S. 12, 16 (2002) (citations and quotations omitted). Remand is  
11 proper where, as here, additional administrative proceedings could  
12 remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d  
13 599, 603 (9th Cir. 1989); see generally Kail v. Heckler, 722 F.2d  
14 1496, 1497 (9th Cir. 1984).

15  
16 The Ninth Circuit's decision in Harman v. Apfel, 211 F.3d 1172  
17 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) ("Harman") does not  
18 compel a reversal rather than a remand of the present case. In  
19 Harman, the Ninth Circuit stated that improperly rejected medical  
20 opinion evidence should be credited and an immediate award of benefits  
21 directed where "(1) the ALJ has failed to provide legally sufficient  
22 reasons for rejecting such evidence, (2) there are no outstanding  
23 issues that must be resolved before a determination of disability can  
24 be made, and (3) it is clear from the record that the ALJ would be  
25 required to find the claimant disabled were such evidence credited."  
26 Harman at 1178 (citations and quotations omitted). Assuming,  
27 arguendo, the Harman holding survives the Supreme Court's decision in  
28

1 INS v. Ventura, 537 U.S. 12, 16 (2002),<sup>2</sup> the Harman holding does not  
2 direct reversal of the present case. Here, the Administration must  
3 recontact treating physicians concerning "outstanding issues that must  
4 be resolved before a determination of disability can be made."  
5 Further, it is not clear from the record that the ALJ would be  
6 required to find Plaintiff disabled for the entire claimed period of  
7 disability were the opinions of the treating physicians credited.

8  
9 **CONCLUSION**

10  
11 For all of the foregoing reasons,<sup>3</sup> Plaintiff's and Defendant's  
12 motions for summary judgment are denied and this matter is remanded  
13 for further administrative action consistent with this Opinion.

14  
15 LET JUDGMENT BE ENTERED ACCORDINGLY.

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17 DATED: December 31, 2008.

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19 \_\_\_\_\_/S/\_\_\_\_\_  
20 CHARLES F. EICK  
21 UNITED STATES MAGISTRATE JUDGE  
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24  
25 <sup>2</sup> The Ninth Circuit has continued to apply Harman despite  
26 INS v. Ventura. See Benecke v. Barnhart, 379 F.3d 587, 595 (9th  
27 Cir. 2004).

28  
29 <sup>3</sup> The Court has not reached any other issue raised by  
30 Plaintiff except insofar as to determine that reversal with a  
31 directive for the payment of benefits would not be appropriate at  
32 this time.